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IN THE

Supreme Court of The United States

October Term, 1949

No. 706

CITIZENS ICE AND COLD STORAGE COMPANY, ET AL.,

Petitioners

vs.

THE ATLANTIC COMPANY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

Opinion of the Court Below

he opinion of the Court of Appeals for the Fifth Circuit is reported in 178 F. 2d pages 453-58.

II.

Jurisdiction

The jurisdiction of this Court has been properly invoked as set out in the petition (page 21).

III.

Statement of the Case

Petitioners have asked this Court to review a reversal by the Court of Appeals for the Fifth Circuit of an interlocutory order by the District Court restraining respondent from cer-

tain practices allegedly in violation of Section 2 of the Sherman Anti-trust Act (26 Stat. 209, 15 U.S.C.A. § 2) and Section 3 of the Robinson-Patman Act (49 Stat. 1528, 15 U.S.C.A. § 13a). Respondent also asked the Court of Appeals to require entry of summary judgment pursuant to its timely motion which had been overruled by the District Court (R. 83). The Court of Appeals, however, merely reversed the order granting an injunction and returned the cause to the District Court for further and not inconsistent proceedings.

The District Court passed on petitioners' motion for an interlocutory injunction and respondent's motion for summary judgment without hearing witnesses, and relying solely upon affidavits and documentary evidence submitted on behalf of both parties. In its opinion accompanying its order and judgment, the District Court made only the most general findings of fact and made no attempt to resolve the detailed contradictions as to basic facts displayed by the affidavits (R. 77-82).

In the words of the Court of Appeals, however, all that was made to appear was "a war of local price cuttings" and its effect, if any, on interstate commerce was "insubstantial, inconsequential and remote". (R. 94). Since it was apparent that the findings of the District Court were unsupported by the evidence and clearly erroneous, the District Court was reversed and the cause remanded for further proceedings.

IV.

Reasons Relied on for Denying the Writ

Effect of Petition Is to Request a Trial de Novo

The effect of petitioners' request for a writ of certiorari is to ask that this Court grant them a trial *de novo* on the merits of their request for an interlocutory injunction restraining certain practices of respondent. The major question in the determination of the issues in this case is whether or not respondent's business can be characterized as being so closely connected with interstate commerce as to come within the provisions of the applicable federal statutes. The only findings

by the District Court in any way pertinent to this issue are:

1. ". . . the defendant sold ice to different parties to be used in refrigerating railroad cars and trucks which were transporting goods to other states". (R. 77).

2. "This Court holds, however, that by authority of the courts the evidence submitted was sufficient for the plaintiffs to obtain the relief prayed for." (R. 80).

3. ". . . the sale of ice under the circumstances and facts as disclosed to the court was an integral part of the interstate commerce". (R. 80).

Upon this state of the record, the Court of Appeals was required to make a study of all the affidavits and documents submitted to determine whether or not there was any justification for these mixed findings of facts and conclusions of law alleged to be unsupported. In a careful opinion by Judge Hutcheson, speaking for a unanimous court, he points out that there is uncontradicted evidence that sales to interstate trucks and railroads were merely incidental to respondent's local business, and that in the aggregate they composed less than one per cent of its business (R. 89, 90). The Court therefore found that there was no evidence whatsoever which supported the conclusions of the District Court and the case was reversed and remanded for further proceedings.

This Court is now asked to make a third study of the affidavits and documents in the record and decide *de novo* whether or not there is sufficient competent evidence to prove a violation of Section 2 of the Sherman Act or Section 3 of the Robinson-Patman Act so as to justify a reversal of the Court of Appeal's decision. No substantial question concerning the application of either of these Acts is raised, and the question is limited to an appraisal of the evidence. It would not seem that a controversy such as this merits the exercise of this Court's discretionary power of review by writ of certiorari.

No Major Issue of Policy

Essentially, the case involved a local price war. The record discloses that respondent was in business in both Colquitt and Bainbridge, Georgia, prior to either of petitioner's entry into business (R. 37-39, 46-52). The principal operating heads of the Citizens Ice & Cold Storage Company at Bainbridge and of Crystal Ice Company at Colquitt were former employees and distributors of respondent (R. 5, 32). They built their respective plants many years after respondent had established its business (R. 32, 33, 38-39). They were familiar with all of respondent's customers and built their plants at locations to give them a decided advantage over respondent in competing for the business in these communities (R. 39, 45, 49, 51). In other words, these former employees and distributors "moved in" on respondent, and sought to take from it all its business in these communities. And in fact, petitioners did succeed in getting most of the business in both towns (R. 39, 49).

The only part of the business which is contended to have been interstate in character were sales to some truckers and to railroads at the platform of respondent. It is apparent from the Record, as found by the Court of Appeals, that the effect of these operations on interstate commerce was so minute as to be almost nonexistent. Both courts below recognized the settled principles of anti-trust law which controlled the situation, and the only controversy concerns their application to a somewhat uncertain set of facts in the Record. It is submitted that this is not such a case as to merit consideration by this Court.

V.

Decision by Court of Appeals

It further appears that the unanimous decision by the Court of Appeals was clearly correct and in harmony with recent decisions by this Court. The Court accepted the finding by the District Judge that respondent was engaged in a price

war with its competitors. Its reversal was based solely on the proposition that the record disclosed no evidence which established that respondent's conduct was either aimed at or sufficiently connected with interstate commerce to come within the provisions of the federal statutes.

The Court of Appeals was clearly under the duty to review the record on appeal and determine whether the findings of fact were supported by evidence or were clearly erroneous. This Court has not only rcently upheld the power of an appellate court to review such a record, but has pointed out that it is the duty of the court to exercise such review. Thus in *United States v. Gypsum Co.*, 333 U. S. 364, this Court pointed out that Rule 52(a) of the Rules of Civil Procedures was intended to adopt the then prevailing equity practice and proceeded to hold (p. 395):

> "The practice in equity prior to the present Rules of Civil Procedure was that the findings of the trial court, when dependent upon oral testimony where the candor and credibility of the witnesses would best be judged, had great weight with the appellate court. The findings were never conclusive, however. A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

The fact that this case was tried solely upon affidavits and documentary evidence removes the primary objection to the reversal of findings of fact made by a trial court, since no question of judging the credibility of witnesses from their demeanor and appearance on the witness stand is involved. It was, therefore, the duty of the Court of Appeals to review the record, and upon a finding that the District Court's conclusions were unsupported by the evidence, to reverse the order of the District Court.

An examination of the Record substantiates the decision of

the Court of Appeals. There is no evidence whatever that petitioner (Crystal Ice Company) or respondent sold any ice whatever at Colquitt, Georgia, which could be said to be involved in interstate commerce. Neither party at Colquitt sold any ice to any interstate truckers or railroads. Nevertheless, the District Court granted an injunction against the conduct of respondent in cutting the price of ice at Colquitt (R. 81).

Furthermore, there is no evidence that either of the petitioners (Citizens Ice & Cold Storage Company and Flint River Mills, Inc.) at Bainbridge sold any ice which would affect interstate commerce. The only part of the business which is claimed to have any connection with interstate commerce were the sales made by respondent from its platform at Bainbridge in the ordinary course of its business to interstate trucks and railroad carriers (R. 44). No trucks or railroads were "iced" by respondent. Special equipment is required for "icing" these vehicles. No such equipment existed, either at Bainbridge or at Colquitt (R. 72). Respondent submits that none of these sales constituted interstate commerce. They were completed for cash, at the point of delivery, namely, at respondent's platform, and the resulting use by the purchaser was not a part of the sale. Consequently, these sales were not in interstate commerce nor a part thereof.

Eastern Air Transport, Inc. v. S. C. Tax Commission
285 U. S. 147

Superior Oil Co. v. Mississippi
280 U. S. 390

Dept. of Treasury of Ind. v. Wood Preserving Corp.
313 U. S. 62

Puget Sound Stevedoring Co. v. State Tax Commission
302 U. S. 90, 94

It is recognized that the foregoing cases dealing with state taxes are not themselves conclusive on the question involved.

Still, they very definitely point out the line of demarcation between intrastate and interstate activities.

In order for the petitioners to maintain their action it was necessary to show that the transactions complained of consisted of sales of goods in interstate commerce or in the "course of" such commerce. It is not sufficient that respondent be engaged in interstate commerce. The very transactions complained of must have been in interstate commerce.

Blumenstock Bros. v. Curtis Publishing Co.
252 U. S. 436, 440

But even if it be conceded that these incidental sales could be characterized as interstate commerce, their volume was so minute as not to color respondent's operations. The uncontradicted evidence shows that sales to truckers and railroads represented less than one per cent of respondent's business (R. 71). And if the combined operations of petitioners' and respondent's business are considered, these sales represented less than one-half of one per cent of th business in these communities. It is recognized that this Court held in *United States v. Yellow Cab Company*, 332 U. S. 218, that it is only necessary that an "appreciable" amount of interstate commerce be involved. Nevertheless, in order to violate Section 2 of the Sherman Act it must appear that the aim of the plan or course of conduct was directed toward interstate commerce. And where there is no intent or objective to restrain interstate commerce or monopolize any part of it, there is no violation of the statute.

In *Schechter Poultry Corp. v. United States*, 295 U. S. 495, 547, this Court held that where the objectives are limited to intrastate activities, and the intent to restrain interstate commerce is absent, the fact that there may be an indirect effect upon interstate commerce does not subject the party to the statute.

If the aim of the plan or conduct is to accomplish a local object and not for the purpose of restraining interstate trade

or commerce, the Anti-Trust Acts do not apply, although interstate commerce may be incidentally affected.

United Leather Workers v. Herkert
265 U. S. 457

Levering & G. Company v. Morrin
289 U. S. 103, 107

Industrial Assn. of San Francisco v. United States
268 U. S. 64

The history of the *Yellow Cab* case recently before this Court illustrates the correctness of the decision by the Court of Appeals. In Yellow Cab's first appeal to this Court it was held that the volume of commerce restrained was immaterial, provided that the defendants attempted to monopolize some appreciable aspect of interstate commerce. *United States v. Yellow Cab Co.*, 332 U. S. 218. On remand to the District Court it was found that defendants' acts were motivated by business purposes and that no intent to monopolize commerce had been proved. *United States v. Yellow Cab Co.*, 80 F. Supp. 936. On the second appeal to this Court, the judgment of the District Court was affirmed. *United States v. Yellow Cab Co.*, 70 Sup. Ct. 177 (No. 22, October, 1949 Term). Also see *United States v. Columbia Steel Co.*, 334 U. S. 495.

Respondent urges that the record in this case does not even disclose an appreciable amount of interstate commerce to be involved. In any event, it is clear that respondent's purpose was to preserve its business in the local market, which represented more than 99% of its total volume. It is clear that it was not respondent's purpose to monopolize the small volume of business involved in selling ice to truckers and railroads. No intent to monopolize can possibly be inferred where the interstate commerce subject to monopoly is so minute. Nevertheless, the District Court found that respondent was guilty of such intent and purpose at both Colquitt and Bainbridge. No interstate commerce at all existed at Colquitt. When the

total sales of ice at both places are considered, the sales to truckers and railroads were less than ½ of 1% of respondent's sales. The Court of Appeals correctly held, we submit, that this finding was a mistake. It was clearly erroneous.

Although the District Court based its ruling equally upon Section 3 of the Robinson-Patman Act, it seems clear that the facts do not disclose a violation of the Robinson-Patman Act sufficient to justify the order entered by the District Court. The Robinson-Patman Act makes it "unlawful for any person engaged in commerce, in the course of such commerce" to sell goods at lower prices in one locality than the prices charged elsewhere for the same goods. (49 Stat. 1528, 15 U. S. C. A. § 13(a)). Since the only sales which petitioners contend were in the course of commerce amounted to less than one per cent of respondent's business at Bainbridge alone, it is apparent that substantial relief cannot be based on this section of the law.

The previous discussion of the Sherman Act concerns principles equally applicable to the issues raised under the Robinson-Patman Act.

VI.

Cases Cited by Petitioners

This Court has often pointed out the difference in language used by Congress in statutes regulating various aspects of commerce. "In so describing the range of its control, Congress is not indulging stylistic preferences . . ."

Polish Alliance v. Labor Board
322 U. S. 643, 647

To the same effect, see:

Kirschbaum Co. v. Walling
316 U. S. 517, 520

Most of the cases cited by petitioners involve federal legis-

lation other than the anti-trust laws. Consideration of the cases relied upon by petitioners to establish the proposition that the sale of ice to carriers is interstate commerce will reveal this fact (Petitioners' brief, Page 25).

Hamlet Ice Co., Inc. v. Fleming
127 F. 2d 165

Southern United Ice Co. v. Hendrix
153 F. 2d 689

Atlantic Co. v. Walling
131 F. 2d 518

Fleming v. Atlantic Co.
40 F. Supp. 654

Gordon v. Paducah Ice Mfg. Co.
41 F. Supp. 980

Every one of these cases cited by petitioners concern the construction of the Fair Labor Standards Act, which Act contains specific language extending its scope to the "production of goods for commerce". (29 U. S. C. A. §§ 206, 207.) These cases are not therefore either controlling or persuasive authority on the questions here involved, and the difference in statutory language prevents them from being particularly helpful in a determination of this case. "Translation of an implication drawn from the special aspects of one statute to a totally different statute is treacherous business."

Trade Commission v. Bunte Bros.
312 U. S. 349, 353

Conclusion

It is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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